Supreme Court, U. S.
FILED
JAN 14 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1098

VICTOR DIVIVO
Petitioner

v.

UNITED STATES OF AMERICA
and
W. DONALD BELL
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MARVIN J. GARBIS
ALLEN L. SCHWAIT
PAULA M. JUNGHANS
Garbis and Schwait, P.A.
1001 Keyser Building
Baltimore, Maryland 21202

Attorneys for Petitioner

TABLE OF CONTENTS

Opinions Below.....2

Jurisdiction.....2

Questions Presented.....3

Rules And Statutes Involved.....4

Reasons For Granting The Writ.....7

Statement Of The Case.....7

A. Statement Of The Proceedings.....7

B. Statement Of The Facts.....11

Argument.....15

A. A Taxpayer Who Makes Out A Prima Facie Showing Of Bad Faith In An Internal Revenue Service Investigation, As Petitioner Has, Must Be Afforded An Evidentiary Hearing On The Issue of Bad Faith.....15

B. Petitioner Has Standing To Assert Defenses To Enforcement Of The Internal Revenue Service Summons.....23

Conclusion.....26

Certificate.....26

Appendices.....1a

A. Transcript of Proceedings In The United States District For The District Of Maryland.....1a

B. Opinion Of The United States Court Of Appeals For The Fourth Circuit, dated October 16, 1979.....45a

TABLE OF AUTHORITIES

CASES

In Re Oceana International, Inc., 49 F.R.D. 329 (S.D. N.Y. 1970).....25
Pepsico, Inc. v. F.T.C., 472 F.2d 179 (2nd Cir. 1972) cert. denied 414 U.S. 876.....25
Reisman v. Caplin 375 U.S. 440 (1964)....18
Spangler v. United States, 415 F.2d 1242 (9th Cir. 1969).....25
United States v. Barrett, 505 F.2d 1091 (7th Cir. 1974).....22,23
United States v. Donaldson, 400 U.S. 517 (1971).....16
United States v. Equitable Trust Co., ___F.2d___, 44 AFTR 2nd 79-5794...15,22,23
United States v. LaSalle National Bank, 98 S.Ct. 2357 (1978).....7,9,16,18,19,20
United States v. McCarthy, 514 F.2d 368 (3rd Cir. 1975).....19
United States v. Powell, 379 U.S. 48 (1964).....17,18,19
United States v. Wright Motor Co., Inc., 536 F.2d 1090 (5th Cir. 1976).....18

STATUTES, RULES AND PUBLISHED PROCEDURES

26 U.S.C. §7122(a).....22,23
26 U.S.C. §7602.....17

26 U.S.C. §7604.....6
26 U.S.C. §7609.....3,5,6,8,23
28 U.S.C. §1254.....2
28 U.S.C. §2101.....2
Federal Rule of Civil Procedure 24(a).....3,4,23,24
Internal Revenue Manual, CCH, Vol. 5, Part IX (Intelligence), §9131.....20
Internal Revenue Manual, CCH, Vol. 5, Part IX (Intelligence), §9382.2.....20
Internal Revenue Manual, CCH, Vol. 5, Part IX (Intelligence), §9383.1.....21
Internal Revenue Manual, CCH, Vol. 5, Part IX (Intelligence), §9384.2....20,21
Internal Revenue Manual, CCH, Vol. 5, Part IX (Intelligence), Special Agents Handbook, §242.132.....21
Internal Revenue Manual, CCH, Vol. 5, Part IX (Intelligence), Special Agents Handbook, §243.2.....21

OTHER AUTHORITIES

3B Moore's Federal Practice, §24.16[4].....25
Shapiro, "Some Thoughts On Intervention Before Courts, Agencies and Arbitrators," 81 Harv. L. Rev. 721 (1968).....25
Wright and Miller, Federal Practice and Procedure: Civil §1922.....25

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO.

VICTOR DIVIVO

Petitioner

v.

UNITED STATES OF AMERICA

and

W. DONALD BELL

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Victor DiVivo ("DiVivo") prays that a writ of certiorari issue to review the judgment herein of the United States

Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. B, infra) is reported at ___F.2d___, 44 AFTR 2d 79-5794, and was decided on October 16, 1979. No memorandum opinion of the District Court was issued. The reporter's transcript of proceedings of the District Court on December 15, 1978 (App. A, infra) contains the District Court's oral opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on October 16, 1979. The time for filing of this petition is the 90 day period prescribed by 28 U.S.C. §2101 for civil cases.

The jurisdiction of this Court is invokes under 28 U.S.C. §1254.

QUESTIONS PRESENTED

I. Whether an Internal Revenue Service summons may be enforced without affording intervening taxpayer an evidentiary hearing after he has made out a prima facie case of bad faith in the tax investigation pursuant to which the summons was issued.

II. Whether an Internal Revenue Service investigation of a taxpayer undertaken for the primary purpose of pressuring him to give evidence against another taxpayer is an investigation conducted in bad faith.

III. Whether Petitioner, who had been permitted to intervene as a matter of right under 26 U.S.C. §7609 and Federal Rule 24(a) in an Internal Revenue Service summons enforcement proceeding against a bank, lacked standing to contest the good faith of the tax investigation pursuant to which the summons was issued.

RULES AND STATUTES INVOLVED

Rule 24(a), Federal Rules of Civil Procedure.

INTERVENTION

(a) Intervention of Right. Upon timely application, anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

26 U.S.C. §7609 (in pertinent part)

§7609. Special procedures for third-party summonses.

(a) Notice. --

(1) In general. -- If --

(A) any summons described in subsection (c) is served on any person who is a third-party recordkeeper, and

(B) the summons requires the production of any portion of records made or kept of the business transactions or affairs of any person (other than the person summoned) who is identified in the description of the records contained in the summons,

then notice of the summons shall be given to any person so identified within 3 days of the day on which such service is made, but no later than the 14th day before the day fixed in the summons as the day upon which such records are to be examined. Such notice shall be accompanied by a copy of the summons which has been served and shall contain directions for staying compliance with the summons under subsection (b)(2).

(b) Right to intervene; right to stay compliance. --

(1) Intervention. -- Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respect to the enforcement of such summons under section 7604.

(2) Right to stay compliance. -- Notwithstanding any other law or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to stay compliance with the summons if, not later than the 14th day after the day such notice is given in the manner provided in subsection (a)(2) --

> (A) notice in writing is given to the person summoned not to comply with the summons, and
>
> (B) a copy of such notice not to comply with the summons is mailed by registered or certified mail to such person and to such office as the Secretary may direct in the notice referred to in subsection (a)(1).

REASONS FOR GRANTING THE WRIT

This case raises serious questions concerning the manner in which a taxpayer who intervenes in an Internal Revenue Service summons enforcement proceeding may assert defenses based upon the alleged bad faith of the Internal Revenue Service. Although this Court's decision in United States v. LaSalle National Bank, 98 S.Ct. 2357 (1978) disposed of long-debated issues with respect to summons enforcement proceedings, it raised new questions concerning procedures to be followed and standards to be met in such cases, which require further clarification from this Court.

STATEMENT OF THE CASE

A. Statement of the Proceedings

This case arises out of an Order of the United States District Court for the District of Maryland (Hon. C. Stanley Blair), grant-

ing a Petition to Enforce Internal Revenue Summons. The United States filed a Petition to Enforce Internal Revenue Summons in the District Court against the Equitable Trust Company, after Equitable Trust declined to comply with an Internal Revenue Service summons issued to it by a Special Agent of the Criminal Investigation Division of the Internal Revenue Service for certain bank records pertaining to Angelo DiBiasi ("DiBiasi") and Petitioner DiVivo. Attached to the Petition was an affidavit of Special Agent W. Donald Bell. (The Special Agent had sent a copy of this summons to DiBiasi and DiVivo, pursuant to Title 26 U.S.C. §7609, and DiVivo had sent a written request for non-compliance to Equitable Trust.) DiVivo, having been served with a copy of the Petition to Enforce by the Internal Revenue Service, filed a Motion to Intervene and proposed Response which alleged that the DiBi-

asi investigation was being conducted in bad faith. Attached to the propose Response was an affidavit of Michael Schwarz, counsel for DiBiasi, setting forth facts in support of DiVivo's allegations.

At the hearing before the District Court on December 15, 1978, the Court granted DiVivo's Motion to Intervene, without objection from the Government. The Government then put Special Agent Bell on the witness stand to supplement his affidavit with respect to several matters required by the Supreme Court's decision in United States v. LaSalle National Bank, 98 S.Ct. 2357 (1978). However, the Special Agent did not rebut any of the factual allegations of bad faith made by DiVivo. Nor did the Government present any other evidence to rebut DiVivo's allegations.

The Court permitted DiVivo's counsel to begin his cross-examination of the Special

Agent, but sustained various objections made by Government counsel and then terminated the cross-examination before counsel was able to develop any testimony in support of DiVivo's allegations of bad faith. The Court did not allow DiVivo to present any other evidence, although DiVivo was prepared to do so. Nor had the Court permitted DiVivo any pre-hearing discovery as requested in DiVivo's Response.

The Court then held, in response to the Government's oral motion, that DiVivo had no standing to raise his defenses to enforcement of the summons, and entered an Order granting the Petition. DiVivo noted an appeal to the United States Court of Appeals for the Fourth Circuit and, upon application to the Honorable Harrison L. Winter of the Fourth Circuit, an Order of Stay was entered, pending disposition of the appeal.

The appeal was argued before the United

States Court of Appeals for the Fourth Circuit (Judges Winter and Hall, and United States District Judge Frank A. Kaufman, sitting by designation) on March 14, 1979. On October 16, 1979, the Fourth Circuit issued its opinion (from which Judge Winter dissented) affirming the Order of the District Court.

B. Statement of the Facts

The following statement is based on the pleadings, including the uncontroverted affidavit of Michael Schwarz, Esquire, which was attached to DiVivo's Response, and on the proceedings before the District Court at the hearing of December 15, 1978.

The summons in issue was dated September 8, 1978, and was issued in the Internal Revenue Service criminal investigation of Angelo DiBiasi, who is a business associate of Petitioner DiVivo. DiVivo is also under

investigation by the Criminal Investigation Division of the Internal Revenue Service. (On June 1, 1979, the Criminal Investigation Division of the Internal Revenue Service made a recommendation to the District Counsel of the Internal Revenue Service that DiVivo be prosecuted for evasion of his individual income taxes for the years 1974, 1975, and 1976. To the best of Petitioner's knowledge, District Counsel has not yet acted on that recommendation.) The summons requested the Equitable Trust Company to produce certain bank records of DiBiasi, including records relating to DiVivo, and DiVivo was named in the summons.

As the affidavit of Michael Schwarz stated, the investigation of DiBiasi and four other business associates of DiVivo began after they had voluntarily given Q & A's (deposition-like statements under oath) to the Internal Revenue Service in the investi-

gation of DiVivo. None of these witnesses (also subjects of investigation) was informed at the time of his Q & A that he was a target or potential target of an Internal Revenue Service investigation, although it appears that the Internal Revenue Service may have had incriminatory information with respect to DiBiasi, et al at the time of their Q & A's. Following the Q & A's, and following the sending of notices to each individual that the Internal Revenue Service was investigating him individually, Mr. Schwarz was called by Neil Spearing, the Special Agent in charge of DiVivo's investigation. The Special Agent indicated that it would be to the individuals' benefit to cooperate in the investigation of DiVivo. The subject of immunity was discussed and the possibility of an immunity grant was mentioned. Further, the Special Agent indicated that he was aware that two of the individuals under

investigation were resident aliens. Subsequent to this telephone conversation, Mr. Schwarz was advised by Special Agent Spearing that other Special Agents had been assigned to the investigation of his clients, but that it was proper for Mr. Schwarz to speak with Spearing regarding those investigations. After this second telephone conversation, Mr. Schwarz requested a conference with the Internal Revenue Service to complain of the conduct of the Special Agent. That conference was held and the Internal Revenue Service continued to maintain that its investigation of DiBiasi and the others was proper.

ARGUMENT

A. A Taxpayer Who Makes Out a Prima Facie Showing of Bad Faith In An Internal Revenue Service Investigation, As Petitioner Has, Must Be Afforded An Evidentiary Hearing On The Issue of Bad Faith.

Although the District Court originally granted enforcement of the summons in issue on the ground that DiVivo lacked standing to contest the summons, the Fourth Circuit found that DiVivo had standing, but had not made a sufficient showing of bad faith to justify a full evidentiary hearing on the issue. However, Petitioner contends, as Judge Winter in his dissenting opinion agreed:

> DiVivo has alleged that the IRS undertook its investigation of DiBiasi and issued the summons in question for the purpose, if not the primary purpose, of persuading DiBiasi into cooperating with the investigation of DiVivo by giving evidence against him. If it is proved that the primary purpose of the investigation and the summons was to force DiBiasi's cooperation in the DiVivo

> investigation, then I think Powell requires that enforcement of the summons be denied. It is difficult to conceive of an example of bad faith that would better qualify as "an improper purpose...."

In LaSalle, supra, this Court attempted to define the "good faith" limits of an Internal Revenue Service investigation and the standards for judicial enforcement of Internal Revenue Service summonses, in view of differing interpretations by the circuit courts of its decision in United States v. Donaldson, 400 U.S. 517 (1971).

The Court in LaSalle set forth several requirements that must be met before an Internal Revenue Service summons should be enforced. The Court stated:

> D. In summary, then, several requirements emerge for the enforcement of any internal revenue summons. First, the summons must be issued before the Service recommends to the Department of Justice that a criminal prosecution, which reasonably would relate to the subject matter

> of the summons, be undertaken. Second, the Service at all times must use the summons authority in good faith pursuit of the congressionally authorized purposes of §7602. This second prerequisite requires the Service to meet the Powell standards of good faith. It also requires that the Service not abandon in an institutional sense, ... the pursuit of civil tax determination or collection. Id.at 2368.

The standards set forth in United States v. Powell, 379 U.S. 48 (1964), adopted by LaSalle, were the following:

> [The Service] must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed...[A] court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. Id. at 57, 58. (Emphasis added).

The Court in LaSalle indicated that the above-quoted requirements were not intended to be exclusive and that "[f]uture cases may well reveal the need to prevent other forms of agency abuse of congressional authority and judicial process." Note, 20, Id. at 2368. Petitioner submits that the case at bar is such a case.

Further, while LaSalle sought to clarify the standards for enforcement of Internal Revenue Service summonses, it did not change the pre-LaSalle requirement that where a taxpayer or other person with standing to challenge the enforcement of a summons raises prima facie defenses to enforcement, the Court should hold an evidentiary hearing (and perhaps permit discovery) to determine whether or not enforcement is proper. Reisman v. Caplin, 375 U,S. 440 (1964); United States v. Powell, supra; United States v. Wright Motor Co., Inc., 536 F. 2d 1090 (5th

Cir.1976); United States v. McCarthy, 514 F. 2d 368 (3rd Cir. 1975).

In the case at bar, DiVivo made the strongest possible showing of bad faith on the part of the Internal Revenue Service imaginable in advance of discovery and a hearing. That showing was not based on unsupported allegations but, rather, was based on the affidavit of an attorney which contained detailed, specific allegations of improper conduct on the part of the Internal Revenue Service.

The not so subtle threats and promises and other conduct of the Special Agent set forth above not only violated the good faith requirements of LaSalle, supra, and, more particularly, the prohibition of harassment noted in Powell, supra, but they also contravened several applicable provisions of the Internal Revenue Manual and Special Agents Handbook, both of which regulate the

conduct of Special Agents.

A Special Agent's primary purpose is to investigate alleged criminal tax violations, and, where appropriate, to recommend to the Internal Revenue Service, which in turn can recommend to the Department of Justice, that a taxpayer be prosecuted. See, generally, the discussion of the Special Agent's role in Donaldson v. United States, 400 U.S.517 (1971),834, and LaSalle, supra, at 2363-67. See also Internal Revenue Manual, CCH, Vol. 5, Part IX (Intelligence. ("Manual") It is not part of a Special Agent's duties, and he is specifically prohibited by the Manual and the Special Agents Handbook (a part of the Manual) from pressuring the subjects of an investigation into cooperating, from making threats of prosecution or using other forms of intimidation, and from promising or implying offers of immunity. Manual,§§9131, 9382.2, 9384.2; Special Agents

Handbook, §242.132. When interviewing a witness who is a potential target of a tax investigation because of incriminatory information known to the Internal Revenue Service, the Special Agent is required to advise the witness of his Fifth Amendment rights. Manual, §§9383.1, 9384.2; Special Agents Handbook, §243.2.

Given these prima facie, factual allegations of bad faith, an evidentiary hearing was required in order to fully develop Petioner's allegations. And, Petitioner should have been afforded pre- or post-hearing discovery, which might have obviated the need for the lengthy proceedings abhorred by both the District Court and the Fourth Circuit.

That the conduct of the Special Agents (sanctioned by the Internal Revenue Service institutionally at the conference held to discuss the conduct) did, in fact constitute bad faith should not be debatable. The point

was expressed succinctly by Judge Winter in his dissenting opinion:

> The majority seeks to justify the purpose attributed by DiVivo to the IRS by citing the authority granted to the IRS under I.R.C. §7122(a) to compromise any civil or criminal tax case, prior to referral to the Department of Justice. In United States v. Barrett, 505 F. 2d 1091, 1100-03 (7 Cir. 1974), cert. denied, 421 U.S. 964 (1975), §7122(a) was relied upon to permit the grant of civil tax immunity to the accomplice of a bribery defendant, with respect to the income tax owed by the accomplice on bribes which passed through his hands, in exchange for the accomplice's testimony against the defendant. But the power of the IRS to compromise tax cases has no bearing on the question before us. DiVivo does not deny that if the IRS had undertaken an investigation of DiBiasi in good faith for the primary purpose of determining and collecting DiBiasi's tax liability, then the IRS could properly issue summonses pursuant to that investigation and could ultimately compromise DiBiasi's case in exchange for his testimony against DiVivo. Rather, DiVivo alleges that the investigation of DiBiasi was undertaken in bad faith as a pressure tactic to force DiBiasi to cooperate in the investigation of DiVivo. Nothing

> in §7122(a) or Barrett authorizes the IRS to undertake or pursue an investigation for such a primary purpose.

B. Petitioner Has Standing To Assert Defenses To Enforcement Of The Internal Revenue Service Summons.

As noted above, the District Court's finding that Petitioner lacked standing to assert defenses to the Internal Revenue Service summons in issue was rejected by the Fourth Circuit. However, in anticipation of Respondent's re-assertion of the argument that Petitioner lacks standing, Petitioner submits the following on the issue of standing.

Petitioner's original Motion to Intervene was based on 26 U.S.C. §7609 ("§7609") and Rule 24(a) of the Federal Rules of Civil Procedure, the pertinent portions of which have been set forth above. §7609(b)(1) provides that "[n]otwithstanding any other law

or rule of law, any person who is entitled to notice of a summons under subsection (a) shall have the right to intervene in any proceeding with respection to the enforcement of such summons...." (Emphasis supplied). Further, Rule 24(a) provides for intervention of right when a statute of the United States "confers an unconditional right to intervene." Therefore, there should be no issue that DiVivo was entitled to intervene in the proceedings brought for enforcement of the summons. And, at least initially, the United States did not object to such intervention of the part of DiVivo.

However, the mere conclusion that DiVivo is entitled to intervene does not dispose of the matter. The more serious question raised is whether an intervenor of right may be restricted in the nature of his participation in the proceedings. Petioner suggests that no significant restric-

should be imposed. See, e.g. Spangler v. United States, et al, 415 F.2d 1242 (9th Cir. 1969) (reversing District Court's order denying the United States as intervenor of right in discrimination case against public high schools permission to assert a charge of discrimination against entire school system); Pepsico, Inc. v. F.T.C., 472 F.2d 179 (2nd Cir. 1972), cert.denied 414 U.S. 876; In Re Oceana International, Inc., 49 F.R.D. 329 (S.D. N.Y. 1970) (on motion for reargument: intervenor/purchase of property subject of original suit held not subject to any restrictions on its intervention); Wright and Miller, Federal Practice and Procedure: Civil §1922, at 625; 3B Moore's Federal Practice, ¶24.16[4], at 631 (2d Ed. 1978); Shapiro, "Some Thoughts On Intervention Before Courts, Agencies and Arbitrators," 81 Harv. L. Rev. 721, 755, 756 (1968).

CONCLUSION

For these reasons this Court should issue a writ of certiorari to review the judgment and opinion of the Fourth Circuit in this case.

Respectfully submitted,

MARVIN J. GARBIS
ALLEN L. SCHWAIT
PAULA M. JUNGHANS
Garbis and Schwait,P.A.
1001 Keyser Building
Baltimore, Maryland
21202

CERTIFICATE

I hereby certify that on this 14th day of January, 1980, three copies of the foregoing Petition for Certiorari were mailed, postage prepaid, to Hon. Wade H. McCree, Jr., Solicitor General, Department of Justice, Washington, D.C. 20530.

MARVIN J. GARBIS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA and W. DONALD BELL, SPECIAL AGENT, INTERNAL REVENUE SERVICE	)	
vs.	)	Case No. B78-2313
THE EQUITABLE TRUST COMPANY	)	

Baltimore, Maryland

December 15, 1978

PROCEEDINGS

THE COURT: Good morning, gentlemen, ladies.

MR. HYLAND: Your Honor, this is the matter of the United States of America v. Equitable Trust Company, B78-2313, John Hyland on behalf of the United States, and with me is Dan Wiles, Office of the District Counsel here in Baltimore.

THE COURT: Say that again.

MR. WILES: Wiles, W I L E S.

MR. REICH: Kenneth Reich and Allen Schwait here, Your Honor.

THE COURT: Good morning. Gentlemen, I talked to Mr. Reich yesterday. I am aware that he has strong views with respect to discovery being necessary or desirable in this

case. I told him that I wanted to proceed this morning to hear what you had. Are you having difficulty hearing me?

MR. HYLAND: No, I can hear you, Your Honor.

THE COURT: I asked him to bring the witnesses that he could get, and I assume you have gotten them.

MR. REICH: Yes, sir.

THE COURT: I will then decide if there is anything further that should be done in the way of hearing, and if so, granting that opportunity; if not, rule. Mr. Hyland.

MR. HYLAND: Thank you, Your Honor.

MR. REICH: Your Honor, if I might, just before we begin. There are two preliminary matters. First of all, I didn't know if Your Honor wanted to rule at the outset on the order of the motion requesting intervention to get that disposed of.

THE COURT: Is there anything to rule on?

MR. HYLAND: We have no objection to the intervention, Your Honor.

MR. REICH: Secondly, we would request that the witnesses who plan to testify today be sequestered.

THE COURT: You know who they are, and I don't know who they are. Mr. Hanson, would you take over? Would you help him by telling him who the witnesses are? Because he doesn't know and I don't know.

MR. REICH: Yes, sir. All the gentlemen in the back row.

THE COURT: Mr. Hyland.

MR. HYLAND: Thank you, Your Honor. As the Court is aware, we are here today concerning the Government's request to enforce the Internal Revenue Service summons served on the Equitable Trust Bank. As far as that particular summons is concerned, it indicates right on its face that this particular summons served on the bank is in the matter of the tax liability of Angelo DiBiasi.

THE COURT: Yes, I read that.

MR. HYLAND: As far as the argument that is being raised by the Intervenor, we feel that the Court need not reach those arguments because there is a question of standing. Even aside from the question of whether there is any merit whatsoever to the points about the alleged bad faith, we feel that the only party who could raise such an argument would be Mr. Angelo DiBiasi and not Mr. DiVivo, so I feel that the Court need not reach any of the questions that have been raised by the Intervenor as far as the question of good faith by the Internal Revenue Service. For the purposes of supplementing the affidavit submitted by the Special Agent in this case, Your Honor, the Special Agent working on the matter of Mr. DiBiasi, we would ask the Court to put Mr. Don Bell, the Special Agent, on the stand just for the purpose of supplementing his affidavit, and we would ask to restrict his testimony to certain areas.

MR. REICH: Your Honor, if I might just respond to Mr. Hyland's argument? At the out-

set, the Court asked if there was any objections to our intervening. Mr. Hyland indicated no objections, therefore, I think he has waived any argument he might have as to Mr. DiVivo's standing. Mr. DiVivo is now a party to the action by order of the Court, and under Section 7609 he certainly has a right to object if he has a valid objection, which he does, to enforce the summons for any reasons that would invalidate the investigation. I don't see the argument that Mr. Hyland has as having any merit whatsoever.

THE COURT: We can get to that. I understand your position. Could I hear from whoever you want to present?

MR. HYLAND: We would like to call Mr. Don Bell. He is one of the gentlemen that has just been sequestered.

Whereupon --

WILLIAM DONALD BELL JR.

A WITNESS, CALLED FOR EXAMINATION ON BEHALF OF THE UNITED STATES, HAVING BEEN FIRST DULY SWORN, WAS EXAMINED AND TESTIFIED AS FOLLOWS:

THE CLERK: Please state your name and spell your last for the record.

THE WITNESS: William Donald Bell, Jr. B E L L.

THE COURT: Go right ahead, and the faster we go the better we will be. At 10:30 I will have to interrupt because we have a rearraignment.

MR. HYLAND: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. HYLAND:

Q. Mr. Bell, you are an investigator of the Internal Revenue Service?

A. Yes, sir.

Q. In the performance of your duties, were you assigned to conduct the investigation of Angelo DiBiasi?

A. Yes, sir.

Q. If you recall, approximately when were you given this assignment, sir?

A. Around March of 1978.

Q. In the performance of your duties, did you have occasion to issue a summons to the Equitable Trust Company on or about September 8, 1978?

A. Yes, sir.

Q. Are you aware today whether or not any recommendations have been made by the Internal Revenue Service to the Department of Justice for criminal prosecution of Mr. Angelo DiBiasi?

A. No, sir, there hasn't.

Q. Is it not true that you as the case special agent would initiate any criminal recommendation from the Internal Revenue Service to the Department of Justice?

A. Yes, sir.

Q. Is it true that you would do that by writing what is called an S.A.R. or a Special Agent's Report?

A. Yes, sir.

Q. Have you at this time begun writing that Special Agent's Report?

A. No, sir.

Q. Have you for any reason delayed the beginning of the writing of your Special Agent's Report so as to prolong the use of the summons authority?

A. No, sir.

Q. Are you aware that anyone else has made any recommendation to the Department of Justice in this matter for criminal prosecution?

A. No, sir.

Q. In the performance of your duties, sir, and specifically in the drafting and service of this particular summons to the Equitable Trust Company, did you follow all administrative and procedural steps required by the Internal Revenue Code?

A. Yes, sir.

Q. And to the best of your recollection could you briefly tell the Court what you did in following those administrative and procedural steps in the issuance of this summons?

A. Okay. I would have taken the summons to the bank and served it on the bank

representative, and then when I returned to the office I take the steps necessary to send notices out to the respective people per the summons. Do you want me to tell you who they would be on the summons?

Q. Yes, please, tell us who you did send this information to.

A. I am certain on this particular summons it would be Mr. Angelo DiBiasi, his attorney, who is Michael Schwarz, and Mr. Victor DiVivo.

THE COURT: You did what with respect to Mr. DiVivo?

THE WITNESS: I would send him a copy of the summons.

THE COURT: Why?

THE WITNESS: It is required by the Internal Revenue Code that on third party summones to banks that I send out notice to the taxpayer, his representative, and then anybody else that I might mention in the summons if I am asking for records that might be pertaining to them.

THE COURT: Go ahead.

BY MR. HYLAND:

Q. Prior to the issuance of this summons, did you have to obtain approval of any of your superiors?

A. Yes, sir, I did.

Q. Did you do that?

A. Yes, sir.

Q. From whom did you obtain approval?

A. It would have been by group manager, who is Michael Daley.

Q. If you recall, is Mr. DiVivo anywhere mentioned in the body of the summons that you served on Equitable Trust Company?

A. I think he is.

MR. HYLAND: Your Honor, nothing further of this particular witness.

We would petition the Court that based on the original affidavit of this Special Agent, Mr. Bell, supplemented by his testimony here today, Your Honor, this would be sufficient evidence for the Court to rule so as to enforce the summons requested.

THE COURT: Mr. Reich.

MR. REICH: Does Your Honor have any objection if I stay seated while I examine the witness?

THE COURT: Not at all.

CROSS-EXAMINATION

BY MR. REICH:

Q. Mr. Bell, how long have you been an agent?

A. Approximately six years.

Q. Now, are you involved at all in the investigation of Mr. DiVivo?

MR. HYLAND: Objection, Your Honor?

THE COURT: Tell me what your reason is.

MR. HYLAND: It would be beyond the scope of anything that I asked Mr. Bell on direct examination, and we feel it is beyond the scope of this particular hearing as to whether or not a summons was directed to Mr. DiVivo.

THE COURT: Overruled.

BY MR. REICH:

Q. Mr. Bell, your answer to that question, please, as to whether you were involved in the DiVivo summons?

A. You might have to clarify what you mean by being involved.

Q. Have you had any investigative duties or functions related to that investigation?

A. I have probably accompanied somebody as a witness, if that is what you mean.

Q. Who have you accompanied as a witness?

A. The agent that is working on the case.

Q. Who is that?

A. I guess Mr. Spearing.

Q. S P E A R I N G ?

A. Right.

Q. Do you know for a fact that he is the agent that is in charge of that investigation?

A. I believe he is.

THE COURT: What is the name?

THE WITNESS: Neil Spearing.

THE COURT: Would you spell it for me?

THE WITNESS: It is, S P E A R I N G.

THE COURT: Special Agent?

THE WITNESS: Yes, sir.

BY MR. REICH:

Q. Are there any other agents involved in that investigation to your knowledge?

A. I don't know how to answer your question because Mr. Spearing -- if he goes and interviews somebody he is liable to take anybody available.

Q. Are there any other agents working actively on that investigation with him?

A. Not that I know of.

Q. You had indicated you had accompanied him on on interview?

A. Yes.

Q. Was that of the third-party witness?

A. Yes.

THE COURT: Third-party what?

MR. REICH: Witness.

Q. Who is that person?

MR. HYLAND: Your Honor, we would object that this would -- for the witness to answer this particular question to acquire from the third party the tax information.

MR. REICH: If it involves the DiVivo investigation, we certainly would waive any objection under the Code.

THE COURT: Let them confer on what they are going to do.

MR. HYLAND: Your Honor, in addition we feel that the Intervenor is attempting to use this forum as a method of discovery of anything that might be going on during the investigation of this particular matter.

THE COURT: Yes.

MR. REICH: Your Honor, if the IRS prefer the witness to tell the Court in camera, we have no objection.

THE COURT: What good would that do? Are you going to put it together some way with other matters?

MR. REICH: I think it is important to know what Mr. Bell and the other agents, what their relationship is to the DiVivo investigation. Our point is that this investigation and the others are all related to DiVivo, and is all part of one investigation. I think it is entirely relevant to know to what capacity Mr. Bell is involved in the

DiVivo investigation.

THE COURT: Overruled. What is the answer? Do you remember the question?

THE WITNESS: I think the question was who I might have been involved with interviews on.

THE COURT: Was it a person or persons?

MR. REICH: He indicated one. If there is more than one, I would like to know.

THE WITNESS: There might have been a couple of people that I have gone out with in the last nine months or longer as a witness, but to give you names and -- you know -- without me checking my records, the people don't mean anything to me.

THE COURT: Is your answer you don't know?

THE WITNESS: I do not recall the names of people that I have talked to. Not necessarily talked to, but accompanied Mr. Spearing.

MR. REICH: I don't want to prolong this.

Q. Mr. Bell, you indicated that without your records you have no knowledge. I have subpoenaed you , have I not, to this hearing?

A. I guess you did.

Q. Did you receive a subpoena?

A. I got a copy of one.

Q. Didn't that subpoena request that your bring with you records relating to the DiVivo investigations?

A. I guess it did.

Q. Did you bring those files or records with you?

A. I don't have any records with me.

MR. HYLAND: Your Honor, the witnesses have receive various disclosure authorities from the Secretary of the Treasury. That disclosure authority does not go to any of the documents that they might have amassed during their investigation.

THE COURT: You know, I have a problem with that. I had a problem with the IRS once before in this respect. I do not understand it to be the IRS's role to make a unilateral determination as to what the Court may or may not do or see. Are you going to give me some law?

MR. HYLAND: There is a provision, it is 6103 Section 8 of Title 26, if I could just locate that for the moment, Your Honor.

THE COURT: What does that have to do with whatever it says to the obedience of a subpoena? Having the records is one thing, and being required to produce them is something else.

MR. HYLAND: There is some language here in Section 6103 Number 4. It says, "However such return or return information shall not be disclosed as provided until the Secretary of the Treasury determines such disclosure would identify a confidential informant or

seriously impair a civil or criminal tax investigation."

We feel here wo do have an ongoing joint criminal, civil tax investigation going.

THE COURT: He doesn't have the records in response to the subpoena as I understand it. I had that problem once before. I do not understand it to be the Commissioner's or the IRS's right to override a subpoena; do you?

MR. HYLAND: No, Your Honor.

THE COURT: That is production, having available, present in the courtroom. I had that happen one other time, but counsel frankly told me we didn't bring them because we were afraid you would require us to present them.

MR. HYLAND: Your Honor, the particular points that the Intervenor has raised and is now trying to get, these documents and papers, were just served on the Government a day and a half ago. If the Court would desire to get into that area, the Government would ask for some additional time to respond in writing, Your Honor, and to also submit additional affidavits to the Court.

THE COURT: I am not even addressing that. I am talking about if you received a court subpoena you come with the material. Whether you have to turn it over is another matter. It is not here; is that correct?

MR. HYLAND: Your Honor, we have it across the street, and it could be produced in the court.

MR. REICH: Your Honor, I would request that they produce that --

THE COURT: What is it that you want?

MR. REICH: Your Honor, I have a number of questions that I am going to address to this witness and to others.

THE COURT: Well, you address them without it at the moment, we don't have them here, so let's see where we go from there. The Equitable subpoena which I was looking for and didn't seem to find in the file -- I am sorry, I am looking at the subpoena of Mr. Bell. Is the subpoena of the Equitable Trust Company filed as part of this?

MR. REICH: Your Honor, I have the original. The summons is attached to the Petition as an exhibit.

THE COURT: I think I have it right here, I am not sure. Is it in here?

MR. REICH: It is attached to the Petition as one of the exhibits.

THE COURT: It is the back side of the page. I see it now. Are you able to proceed?

MR. REICH: Yes, subject, of course, to having available the documents later.

THE COURT: Well, subject to my determination.

BY MR. REICH:

Q. Mr. Bell, you indicated that you had

accompanied Mr. Spearing on several trips to visit or interview witnesses. Where were these witnesses located, if you can recall?

A. I have been, I believe, to a place in New Jersey. The town I don't know.

Q. That is all right. New Jersey, and anywhere else?

A. I think possibly in Delaware.

Q. Do you remember when you took these trips to interview the witnesses?

A. Some time within the last year.

Q. Was it before or after the investigation of Mr. DiBIasi and the other business associates of Mr. DiVivo began? Was it before or after approximately March of '78?

A. It might have been both. I am not saying that I have gone since that time, but I could have been with him on occasions prior to that time. I just don't remember.

Q. Would your records reflect precisely when you took these trips?

A. Yes, they would.

Q. Are you aware that Angelo DiBiasi is under investigation by the IRS?

A. Yes, I am.

Q. Are you handling that investigation?

A. Yes, I am.

Q. Are you aware that Mr. Colavita is under investigation?

MR. HYLAND: Objection, Your Honor.

THE COURT: I don't understand who he is, let alone rule on your objection. What is it?

MR. HYLAND: Your Honor, again we are getting into --

MR. REICH: Let me explain so we can get background --

THE COURT: Let's back off here and go to the rearraignment. We are obviously not going to get very far with this. Let me see counsel up here, please. You can step down, Mr. Bell.

(DISCUSSION OFF THE RECORD AT THE BENCH)

THE COURT: You can get your witnesses out of the room, and we will resume in half an hour.

(RECESS -- 10:30 A.M.)

(AFTER RECESS -- 11:30 A.M.)

THE COURT: Gentlemen, I see your files.

MR. HYLAND: Yes, Your Honor.

THE COURT: Don't open them yet. Where were we?

MR. HYLAND: Your Honor, we had Special Agent Bell on the stand.

THE COURT: Resume the witness stand, please.

Whereupon --

WILLIAM DONALD BELL, JR.
A WITNESS, CALLED FOR EXAMINATION ON BEHALF OF THE UNITED STATES, HAVING PREVIOUSLY BEEN DULY SWORN, RESUMED THE STAND AND TESTIFIED FURTHER AS FOLLOWS:

THE COURT: Mr. Reich, you were asking questions, I believe, weren't you?

MR. REICH: Yes, Your Honor. Could the Court reporter read my last question, please?

THE COURT: Yes.

MR. REICH: I think we were into the question of records that he had, whether they reflected any trips that he had taken.

THE COURT: Yes, he said Delaware, I recall, and New Jersey.

MR. REICH: I recall New Jersey, but not Delaware. I asked him whether he could specify the time that he went, and he said not specifically, but he could look at the records.

THE COURT: Have you, by the way?

THE WITNESS: No, sir.

THE COURT: Do you know now?

THE WITNESS: I know of one thing. My records would show that I went with the other Special Agent, it probably would show where I went, but it wouldn't necessarily show who he interviewed. I don't keep records on other taxpayers.

BY MR. REICH:

Q. Would it show the date?

A. I would be able to determine the dates based on records that I have. That record would be my diary.

THE COURT: Do you have your diary?

THE WITNESS: No. I don't think my diary was asked for in the subpoena. It is more or less my time report which would include a lot more than just the matters related here.

MR. REICH: Why don't we go on.

Q. I asked you whether you were aware that Mr. DiBiasi was under investigation?

A. I said yes.

Q. Are you aware that Mr. Colavita was under investigation?

MR. HYLAND: Objection, Your Honor.

THE COURT: I have no idea who he is or how he fits in.

MR. REICH: Let me explain, Your Honor. There are five individuals who are business associates of Mr. DiVivo who are simultaneously under investigation by the Internal Revenue Service, including Mr. DiBiasi. It is our point that the investigation of these individuals was begun solely or principally as a subterfuge to get information against Mr. DiVivo, and furthermore these individuals were interviewed in formal sessions known as

Q & A's at a time when the IRS had information incriminatory to them. The IRS did not inform them of their rights, but went ahead and took these Q & A's, got their information, and then subsequently brought the investigation.

I believe these investigations were brought in bad faith, therefore, it is important for the Court to know precisely what individuals are under investigation, and how their investigation relates, if at all, to the DiVivo investigation. That is the thrust of our points this morning, Your Honor. I might say to the Court, we are not interested in discovery in the DiVivo case. That is not the purpose of the intervention. What we are interested in finding out is why these other individuals are being investigated, and whether the IRS has any good faith purpose to investigate. We have presented the affidavit of Mr. Schwarz, and he is available in the courthouse today to testify that based on his conversation with Special Agents, and based on his representation of these five individuals, that the IRS did not proceed in good faith.

THE COURT: That is his belief, you say.

MR. REICH: It is also based on factual evidence which is contained in his affidavit concerning conversations he had with the Special Agents.

THE COURT: Mr. Hyland, we seem to be going around. Here we go again.

MR. HYLAND: Your Honor, as I mentioned before, the legislative history of the Tax Reform Act concerning intervention makes clear, Your Honor, that the intervention un-

der the Tax Reform Act did not expand the subsequent rights of intervenors other than already existed at law at that particular time. We feel that this intervenor of Mr. DiVivo has no standing to go into these areas whatsoever.

THE COURT: I know you do, and I guess what I am doing there is reserving that. First because I doubt your position, and secondly, even if you are right, which you seem to be, that in the even -- I am not making a determination by saying this -- but in the event that I find, for example, adverse to their position that it is in fact a good faith investigation, then it is sort of subsumed into the whole thing, it would seem to me, and make no difference. The point is as I see it that the records of Mr. DiVivo are integral to the summons that is served on Equitable. They are in there. I understand he is not the taxpayer that has been named.

MR. HYLAND: That is correct. In obtaining records pertaining to Mr. DiBiasi there may be some matters in the Equitable Trust records that may also relate to Mr. DiBiasi, but the Special Agent who issued that summons was conducting the investigation of Mr. DiBiasi, not of Mr. DiVivo.

THE COURT: That goes to the good faith aspect of it. DiVivo is named, isn't he?

MR. HYLAND: That is correct. He is named in the summons as far as certain records, but those records that Mr. Bell was summonsing from the Equitable Trust Bank per-

taining to Mr. DiBiasi were of a partnership that did --

THE COURT: If you are able to show me that -- notwithstanding the position that you have just taken, if you are able to show me that the matter is under investigation in good faith and otherwise complies with the requirements of the case law, they are going to lose and you are going to win. Are we not progressing on that basis?

MR. HYLAND: Your Honor, we feel that under the tests set down in LaSalle that the affidavit of the Special Agent coupled with the supplemental testimony on direct of Special Agent Bell complies with the tests under LaSalle and that the good faith issuance of the summons have been proven.

THE COURT: Well, that doesn't take us back beyond LaSalle, and it doesn't permit much inquiry into the good faith aspect of it at all. It leaves me with the position of the prima facie showing, and the statement in fact that I am acting in good faith.

MR. HYLAND: Yes, Your Honor, but we feel if anyone could raise the argument it should be Mr. DiBiasi, and he is so concerned about it that he is not present, Your Honor.

THE COURT: I understand that, and I said if I agreed with you I would say fine, that would be the line, and I would cut it off right now. I am not sure I am going to agree with you on that.

MR. HYLAND: Your Honor, we feel that although other people are going to be inves-

tigated simultaneously with Mr. DiBiasi and Mr. DiVivo, they certainly are entitled to their privacy rights not to have the disclosure of that fact.

MR. REICH: Let me also indicate to the Court that Mr. Schwarz who is in the courthouse today does represent four of the five other individuals. He did represent the fifth up to and through the time when he was first notified he was under investigation.

THE COURT: The fifth is who?

MR. REICH: Mr. Colavita.

THE COURT: Oh.

MR. REICH: He does not represent him, but did up until a few months ago.

MR. HYLAND: Your Honor, if I can just cite some language to the Court. In the LaSalle case the case of United States v. Morgan Guaranty and Trust --

THE COURT: What do you have there?

MR. HYLAND: It appears at 572 F.2d page 36, and there is a footnote I think that is very important. It is footnote number -- it appears to be footnote number 9 in the Morgan Guaranty Trust case, Your Honor. If I can just briefly read this. It says, "The burden of showing the abuse of the Court's process is on the taxpayer. It is thus clear that the taxpayer must make a substantial preliminary showing before even limited discovery can be ordered."

We feel that this is clearly relevant to the situation that we are in right now,

that even aside from the standing question that this particular intervenor had made no substantial preliminary showing whatever.

THE COURT: I guess the obvious thing is he can't make that kind of showing unless I give him some opportunity.

MR. HYLAND: I think that the decisions indicate that the party has to make a showing even prior to being entitled to the discovery. In this particular instance it is merely an attempt at a fishing expedition, Your Honor.

MR. REICH: We made a very good showing, Your Honor.

THE COURT: May I suggest -- and you can do anything you like, you can continue to object or continue to argue. May I suggest that if I got some facts before me, I would be much better armed to make a decision than simply to accept what I understand your position to be, but to accept it in a vacuum, and I do not feel inclined to do that.

MR. HYLAND: Your Honor, just to reiterate. It is the Government's position that it has complied with the tests of LaSalle, and that the intervenor has not done anything to shake that so that the Court would have evidence in the record right now such as to support the findings in our favor. If the Court wants to hear additional evidence?

THE COURT: I really think I have to. To that extent I am disagreeing with you, and I understand what you are saying, but it amounts, as I see it, to my handing over to you to make a determination of what the answer is in the case. I would be willing to do that under most circumstances, but cer-

tainly not this morning. Could you just let me get some evidence subject to your objection?

MR. HYLAND: Yes, Your Honor.

BY MR. REICH:

Q. Mr. Bell, I had asked you whether you were aware that Mr. Colavita was under investigation.

A. I don't understand whether you overruled the objection or what?

THE COURT: He has given you a question and I haven't said anything.

THE WITNESS: All right, I am sorry.

THE COURT: Go ahead.

A. Am I aware that he is under investigation?

Q. Yes.

A. Yes, I am.

Q. Are you aware that Mr. Fabi, F A B I is under investigation?

A. Yes, I am.

Q. Are you aware that Mr. Gialanella, G I A L A N E L L A, was also under investigation by the Criminal Investigation Service?

A. Yes, I am.

Q. Are you aware that Mr. DiPaola, and I believe that is D I P A O L A, is also un-

der investigation?

A. Yes, I am.

Q. Do you know who these individuals are?

A. Yes, I guess so.

Q. Do they have any relationship to Mr. DiVivo, to your knowledge?

A. I don't know how to answer that.

Q. Are they partners or business associates of Mr. DiVivo?

A. I think some of them are.

Q. Aren't in fact all of them?

A. At this time?

Q. At any time relevant to the summons which was during the period 1974 through 1977?

A. Was the question were they partners or --

Q. Partners or associated in business with Mr. DiVivo?

A. I think they were.

Q. Now, do you know when the investigation of these various individuals began?

A. Of all of them, the exact date?

Q. Yes, the exact date, if you know?

A. I don't know the exact date. It would have been some time in the beginning of 1978.

Q. Would it have been around the same time that the DiBiasi investigation began?

A. I believe so.

Q. That was, according to your testimony, in March of 1978?

A. Yes, sir.

Q. Now, did you know that these investigations began after these witnesses had Q & A's before the Internal Revenue Service in the DiVivo investigation?

THE COURT: Would you restate that?

Q. Are you aware that these witnesses had Q & A's in the DiVivo investigation?

A. Yes, I am.

Q. Did those Q & A's take place prior to the time that the IRS began its investigation of them individually?

A. I believe so.

Q. Now, do you know what was the origin of these five cases?

A. Do I personally know what the origin was? No.

MR. HYLAND: Objection, Your Honor.

THE COURT: Well, I assume your objec-

tion would be to the next question.

MR. HYLAND: Your Honor, we feel that this would compromise an --

THE COURT: A yes or no. He is only asking if he knows. Go ahead. Do you know?

THE WITNESS: Do I know if that is -- can he ask --

THE COURT: Is it within your knowledge as to what the origin of the investigation was, not what it is? Yes or no.

THE WITNESS: I would say no, other than the fact that I am assigned the case.

BY MR. REICH:

Q. Do you know what allegations, if any, were made concerning the DiBiasi case to which you were assigned?

A. Yeah, I know certain allegations.

W. What types were made?

MR. HYLAND: Objection, Your Honor.

THE COURT: Sustained.

MR. REICH: Your Honor, if I might? I think it is important for the Court to know precisely what the purpose of these criminal investigations of these witnesses are in order for the Court to evaluate the relationship of those investigations to the investigation of Mr. DiVivo.

THE COURT: Congress really came up with

a winner when they put this package together, I must say. It is still sustained.

Incidentally, is the lady from Equitable needed for any purpose? I suspect that Equitable's position would be, as it always is, if they are ordered to turn over the records they will turn over the records.

MR. HYLAND: She has the records with her, Your Honor. Actually, if the Court would rule in favor of the Government, the Government would be interested in getting those records as quickly as we could.

THE COURT: Well, leap right over the rail and grab her. I hate to see her inconvenienced for no good reason. What do you have, ma'am? Do you have a handful of them or a boxful?

THE SPECTATOR: No, Your Honor, I just have a --

THE COURT: Is Equitable's situation, to your knowledge, if you are able to answer it, that you will abide by any order of this Court?

THE SPECTATOR: My position is just to produce the records.

THE COURT: May I just do this? See if this would cause you any pain or problem with your employer. Could I direct that you file them with this Court now? I will seal them and then they will be given to the Government if I agree, and if not, they will be returned to Equitable. Would that be agreeable, Mr. Hyland?

MR. HYLAND: That is perfectly agreeable.

THE COURT: I hate to see people waiting around and listening to something if it makes no sense to them.

For the record, your name is?

THE SPECTATOR: Rita Kuchursa, K U C H U R S A.

THE COURT: Your job is what?

THE SPECTATOR: Legal prospect secretary.

THE COURT: Thank you for appearing, and have a good day.
All right, where were we?

MR. REICH: I think you were ruling on the objection.

THE COURT: And I have.

BY MR. REICH:

Q. Mr. Bell, besides Mr. DiBiasi, are you assigned to any other investigation of one of the five individuals?

A. Yes, I am.

Q. And which investigation is that?

A. Mr. Gialanella.

THE COURT: Is he one of the ones you mentioned a moment ago?

THE WITNESS: Yes.

BY MR. REICH:

Q. Have any allegations been made regarding Mr. DiBiasi or Mr. Gialanella that relate to their possible involvement with Mr. DiVivo in addition to tax crimes?

MR. HYLAND: Objection, Your Honor.

THE COURT: What is the reason?

MR. HYLAND: Again we feel that this goes to the specifics of the investigation, and it may well compromise an ongoing investigation.

MR. REICH: He hasn't even answered yes or no.

THE COURT: I know, Mr. Hyland is very cautious. He wants to get that in one question before so there is no mistake. You can answer the question yes or no, can't you?

THE WITNESS: The question was again whether -- could he --

THE COURT: Have any allegations been --

BY MR. REICH:

Q. Have any allegations been made that link Mr. DiBiasi and/or Mr. Gialanella to Mr. DiVivo in connection in the commission of tax crimes?

A. My investigation is with Mr. DiBiasi and Mr. Gialanella. I don't know what he means by linking people together. I am not investigating Mr. DiVivo.

Q. That was not the question. The question was whether when you were handed this case any allegations were made that

would show that Mr. DiBiasi and Mr. Gialanella had a possible involvement with Mr. DiVivo in the commission of tax crimes?

A. Based on how I understand your question, no.

Q. There was nothing in the file or in any reference that was made to you when this case was opened that indicated that Mr. DiBiasi and Mr. Gialanella were involved with Mr. DiVivo in tax crimes, including omission of income or wrongly stated expenses or any other crimes under your jurisdiction?

A. The way I understand the question, no.

MR. REICH: Your Honor, I think at this point we really must require that the Special Agent refresh his recollection from the records so we be entitled, and the Court be entitled, to take a look at the original document to open up this case.

THE COURT: All right, before we do anything further, tell me what your theory is here exactly so that I can understand it, and whoever reviews it upstairs is going to understand it.

MR. REICH: Our theory is a theory backed up by an affidavit, and hopefully backed up by the testimony of these agents that the Internal Revenue Service began the investigation of Mr. DiVivo -- at the time it began its investigation of Mr. DiVivo some time after that I became aware that Mr. DiVivo had other business associates or partners. These were the ones listed by Mr. Bell. The Internal Revenue Service after

doing preliminary investigations contacted these various individuals. They contacted them and asked them to come in for the so-called Q & A's. The individuals came in with their attorney, Mr. Schwarz, and were questioned about various transactions and various involvements with Mr. DiVivo. In the course of the questioning, as the Q & A's would show, and we have them here, in the course of the questioning there were questions that were asked that would indicate that the IRS had some information regarding these individuals themselves in the commission of tax crimes by them. There was certainly information that indicated that the IRS was looking at a pattern of connections, a flow of income, expenses, and so forth between Mr. DiVivo and his individual associates. After the Q & A's were taken, the IRS apparently made a determination to investigate these individuals formally, and had opened up the investigation. Around the time the investigation was opened Mr. Spearing, who is a Special Agent assigned to the DiVivo investigation, and who is not assigned to any of the other investigations, say perhaps one, contacted Mr. Schwarz. Mr. Schwarz is the attorney who represents or did represent these five individuals. He called him, which in itself is unusual. He called him after a date when letters had gone out already to the individuals asking them to contact the various Special Agents named in the letters to see about coming in for an interview. Mr. Spearing contacted Mr. Schwarz and asked him in effect if these individuals wouldn't be willing to cooperate in the DiVivo investigation; whether they wouldn't be willing to come in and review their Q & A's and perhaps change them. The subject of im-

munity came up during that discussion, the subject of in fact several of the individuals were resident aliens who could possibly be deported if they were eventually convicted came up. Again, Mr. Spearing mentioned to Mr. Schwarz that it would be a good idea if these witnesses would cooperate in the investigation of Mr. DiVivo. All of this taking place after the IRS supposedly opened up its own independent investigations of these witnesses, and all of this taking palce through a phone conversation from an agent who wasn't even involved in these other investigations.

After that Mr. Schwartz had another conversation with Mr. Spearing, this time initiated by Mr. Schwarz, and in the course of that conversation Mr. Spearing again indicated the cooperation that might be called for. Mr. Schwarz then asked for a meeting with the IRS to complain about what he considered to be an abuse of the investigatory process in connection with his own clients. He had such a meeting and repeated the conversation he had with Mr. Spearing and further indicated that in his opinion the IRS must have had information incriminatory of his clients at the time they took the Q & A's based on what he knew and the questioning of the Q & A's, and that in his opinion the IRS by not informing these witnesses at the time was abusing its authority. The IRS said that they saw nothing wrong with their investigation, and they were going to continue them.

Now, based on our knowledge of what has taken place in these investigations so far, and based on our knowledge of the DiVivo investigation since we represent him, it is crystal clear to us, Your Honor, that these agents are not on a full-scale investigation

of these individuals. They are on an investigation of these individuals only insofar as they relate to Mr. DiVivo, and only insofar as they can make a case against Mr. DiVivo, and that is simply not part of the Special Agent's job. As my memorandum indicated, the Special Agent is at the lowest level of the criminal investigatory process. He is not an FBI agent, he is certainly not an assistant U.S. attorney. He has no right to talk about immunity, to talk about cooperation, or to do anything that suggests that he is doing anything other than simply investigating a taxpayer.

All of that constitutes bad faith under what standard, LaSalle, Powell -- Powell speaks about harassment. If this isn't harassment, I don't know what it is. When Mr. Hyland says we haven't made a prima facie case, Your Honor, I don't know how we could have made a more prima facie case than we have. We have an affidavit from an attorney that is detailed, it is specific, and it relates to specific conversations and specific improprieties on the part of the Special Agent. That certainly gives us enough room to get in here. It is enough for the Court to rule without hearing any further evidence.

THE COURT: If I ruled without hearing any further evidence, I am going to rule for the Government without any question.

MR. REICH: That is why we want this examination.

THE COURT: I am almost inclined to do that right now having heard what you said, because none of that convinced me very much.

MR. REICH: Your Honor, if you would

look at the decision in Powell --

THE COURT: I have it right here.

MR. REICH: Powell was quoted in LaSalle.

THE COURT: I know it is. What would you have me take from it, the fact that LaSalle preserves the Powell standards?

MR. REICH: LaSalle preserves the Powell standards. I have the 98 Supreme Court.

THE COURT: I have it here.

MR. REICH: Section C.

THE COURT: Section C, not D?

MR. REICH: Section C of Roman numeral three. It is a quotation from Powell.

THE COURT: What would you have me get from that, the good faith aspect?

MR. REICH: Beyond the good faith. They actually define good faith in there halfway down the quotation. The Court indicated that an abuse of process would take place if a summons had been issued for an improper purpose such as to harass the taxpayer or to put pressure on him, or for any other purposes reflected under good faith in a particular investigation.

THE COURT: Speaking of the summons as we have the summons here for Equitable?

MR. REICH: Yes. And as LaSalle indicated, the good faith factors in Powell are not conclusive. In footnote 19 and 20 the

Court explicitly disagreed with the Government's position that there was nothing to talk about if a recommendation for prosecution did not yet make the Department of Justice.

THE COURT: If I let you run your course, who are you going to be presenting to me?

MR. REICH: Mr. Bell, who is a Special Agent involved in several of the cases, Mr. Spearing, who is the Special Agent assigned to the DiVivo case, and also assigned to one of the other cases, Mr. Sapp, who is assigned to two of the other individual cases, Mr. Daley who is the group supervisor, and who was present when this meeting took place, Mr. Furman, who is a civil agent who I know is assigned to the DiVivo case, and if he is assigned to the investigation of these others, I would think that he would lend further credence to our argument, and Mr. Schwarz, who I have already mentioned.

THE COURT: All right.

MR. REICH: Let me indicate to the Court that we have no desire to sit here for days upon days --

THE COURT: We are not going to.

MR. REICH: This is one of the reasons we asked for the right to do a little preliminary discovery to narrow the issues.

THE COURT: All right. The Government's position, again, and I am going to given you an answer right now, with respect to whether the Government has shown enough right and

shouldn't go any further.

MR. HYLAND: Your Honor, the Government's position is that under the tests of LaSalle that the testimony and the affidavit of the Special Agent do show that the Government has complied with LaSalle , with Powell, and that the summons was issued in good faith, Your Honor, that it was for materials that were relevant and necessary to a tax investigation, that those materials were not already in the possession of the Government and that the Government is entitled to the enforcement of the summons.

THE COURT: Were you also in the position to stand?

MR. HYLAND: Yes, Your Honor, if anyone could raise an argument about harassment, it would not be Mr. DiVivo, it would have to be Mr. DiBiasi. I take it he is arguing that Mr. DiBiasi is the one who was harassed. He is not here to make that argument, and Mr. DiVivo would not be entitled to make that argument as an intervenor, Your Honor.

THE COURT: Mr. Reich, I am going to let you take this up to Judge Winter.

MR. REICH: Could I be heard before you rule finally?

THE COURT: Yes.

MR. REICH: I think if Your Honor would take a close look at LaSalle, a close look --

THE COURT: Well, here is LaSalle, and it is not my first exposure to it.

MR. REICH: A close look at the Fourth

Circuit case that came down in the Maryland Lumber and Union Trust --

THE COURT: I don't have Maryland Lumber out here, but Maryland Lumber as I recall - when did that come down?

MR. REICH: Last week, the week before.

THE COURT: That was a washout, wasn't it, when there was no issue left on appeal?

MR. REICH: According to the concurring opinion there was no issue left on appeal, but the facts are different. What I think that case stands for is that if a respondent raises by affidavit, by some evidence something to show that there is a lack of good faith on the part of the Government, that he is entitled to have a full hearing into the enforcement of the summons.

THE COURT: It seems to say something to that effect.

MR. REICH: I have the slip here.

THE COURT: I have the slip back on the desk, so I am familiar with the case you are talking about, I think, to the extent that the issue was moved. The records had been turned over in the interim, and there is a question as to whether it was ripe for an appeal to start with, I believe.

MR. REICH: That issue might have been raised but wasn't discussed in the opinion. I think one issue that was discussed is whether or not the fact that there had been a prior hearing in the case related to these records was res judicata. Be that as it may,

the Court clearly did not quarrel with LaSalle, and supports our position that if you come in with the kind of evidence that we have come in with, and may I say that we have participated in a number of cases involving these types of issues and at least in my experience this is the strongest showing that we have ever made, and I don't know how we could make a stronger showing, at least on a prima facie basis, once you have made that kind of showing you have to have a hearing. Powell requires it, Reisman v. Caplin, the Supreme Court requires it, the McCarthy case which is cited in the Fourth Circuit opinion, all require something more than simply the -- a couple of sentences in an affidavit by the Special Agent and conclusory testimony. We simply raised too much to be foreclosed at this point, and if Your Honor --

THE COURT: I don't know where you'll go, quite frankly. The opportunity now is available apparently to any person feeling aggrieved or feeling under threat of prosecution, as it is obvious here, to frustrate in one way or another the intend of these records endlessly. These cases are coming before us with increasing frequency, and I gathered from what you have said here that you have days of testimony, or at least it appears that way, that you would like to present, all of which will result in, you hope, keeping the records of the Equitable Trust Company from the Internal Revenue Service to determine whether these third-party records reveal something in the way of tax information or bearing on tax information. I told you before how I felt about it.

MR. REICH: Your Honor, in an absolutely

pure world I would agree with you. We have a statute of 7609 which does allow this intervention.

THE COURT: Yes, it does. You are here.

MR. REICH: The Congressional wisdom can be questioned.

THE COURT: It is.

MR. REICH: The point is that we do have a law that allows the intervention in certain circumstances. We submit we are entitled to intervene here and raise our objection, and once we have raised prima facie evidence the way we have we should be entitled to at least a full hearing on those objections.

THE COURT: What I am going to do is the following, and you can get your hearing if Judge Winter disagees and chooses to send it back, and it is simply this: The records that are sought are those of DiBiasi, those records being with Equitable Trust Company, DiBiasi has made no objection to those records. The fact that they appear to, and by description in the summons apparently do, bear on the record-keeping by Mr. DiBiasi -- is that who he is?

MR. REICH: DiBiasi.

THE COURT: No, this gentleman?

MR. REICH: DiVivo.

THE COURT: I am going to go back to the original position of the Government and say you don't have any standing. I will stay the Order, however, to give you the opportun-

ity to take it up within -- how long do you want?

MR. REICH: Are we talking about a direct appeal?

THE COURT: No, no. I don't know what you are talking about, that is going to be up to you.

MR. REICH: Bear with me for a second, I am trying to think off the top of my head to what procedure we are talking about. If we were to enforce the summons to the petition but order a stay, that would be a final judgment which I can make an appeal. I am interested in expediting obviously, so I will take my appeal as soon as possible. If there is another procedure for having this heard quicker than by appeal, I am not aware of it at the present. I would be enlightened by the Court.

THE COURT: I didn't have anything in mind. I was assuming that you would -- I guess what it would be is you would be seeking a stay up there when I give my order.

MR. REICH: If you would issue a stay we certainly --

THE COURT: If I issue the stay the only thing is that it will be on appeal for a period of time, and gosh knows how long that would be which would end any prospect for a lengthy period of time of getting the records, assuming that I am right which, of course, is a position that you wouldn't mind at all.

MR. WILES: Your Honor, the problem with a long time on appeal is that the investiga-

tion of Mr. DiBiasi is not stayed in the sense that the statute of limitations still runs, because he is not a party to this proceeding, and he did not intervene. Normally 7609, 16 U.S.C. provides that any intervention of the taxpayer will stay the statute for the length of the proceeding. Mr. DiBiasi has not intervened and, therefore, under the statute is not stayed.

MR. REICH: Aren't the years '74 through '77? So the six years would run up in 1981; is that correct?

MR. WILES: Yes, I don't know how long a period we are talking about.

THE COURT: I am not talking about any.

MR. HYLAND: Could I suggest that the stay be granted for no more than one week?

THE COURT: That is what I had in mind.

MR. HYLAND: To give the Intervenor the opportunity to determine what, in addition, he is going to do.

THE COURT: That is what I had in mind. All right, Mr. Hanson, we will enter it. Staying for a period of seven days from today, and I will let counsel for the Intervenor determine in that period of time what action you want to take.

MR. REICH: We will go directly to Judge Winter and have him enter this thing.

THE COURT: I rather expect you will. I will leave that up to him. That is as far

as I am going with it absent directions and instructions from him.

Thank you, gentlemen.

(THEREUPON, AT 12:15 P.M., THE HEARING WAS CONCLUDED.)

U.S. and W. Donald Bell, Special Assistant Internal Revenue Service, APPELLEES v. THE EQUITABLE TRUST COMPANY, DEFENDANT and Victor DiVivo, Appellant, U.S. Court of Appeals, Fourth Circuit, No. 78-1093, Oct. 16, 1979. Years 1974-1977. District Court affirmed. Decision for taxpayer.

1. INTERNAL REVENUE SERVICE - Discovery of liability and enforcement of tax-examination of books and witnesses-authority in general-extent of authority. District court erred in denying "full hearing" on issue of IRS' bad faith. IRS issued summons for production of records in furtherance of tax investigation of taxpayer's business associate. Evidence that primary purpose of investigation was "pressure tactic" to force business associate to cooperation in investigation of taxpayer was sufficient to raise question of IRS' good faith. Reference: 1979 P-H Fed. §39,643(20).

Kenneth A. Reich, Allen L. Schwait, Garbis & Schwait, P.A., Attys. for Appellant.

Daniel F. Ross, Gilbert E. Andrews, Charles E. Brookhart, Attys., M. Carr Ferguson, Asst. Atty Gen., Tax Div., Dept of Justice, Russell T. Baker, Jr., U.S. Atty., John Hyland, Asst. U.S. Atty., for Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore, C. Stanley Blair, District Judge.

Before WINTER and HALL, Circuit Judges and KAUFMAN, District Judge.

KAUFMAN, District Judge

(1) This case involves an administrative summons issued by the Internal Revenue Service (IRS) pursuant to 26 U.S.C. §7602 to require the Equitable Trust Company (Equitable), a Baltimore banking institution, to provide all records held by the latter relating to a mortgage loan made by it to DiVivo, Intervenor herein, and DiVivo's business associate, DiBiasi, in their capacities as individuals trading as Italian Delight Restaurant. The summons is sought in furtherance of a tax investigation of DiBiasi, not DiVivo, but specifically refers to "records *** with respect to a mortgage loan made by and between Angelo DiBiasi and Victor DiVivo, T/A Italian Delight Restaurant at 115-117 East Baltimore Street and the Equitable Trust Company ***". The facts, giving Intervenor DiVivo the benefit of all inferences which may reasonabl flow from the evidence produced to date and the evidence proffered by Intervenor, are as follows:

Beginning in 1977, Intervenor became the subject of a tax investigation by the Criminal Investigation Division of the Internal Revenue Service (IRS).[1] In December 1977, DiBiasi and four other persons were directed by the IRS to appear before the IRS Special Agent in charge of the tax investigation of DiVivo to answer questions under oath relating thereto. Neither DiBiasi nor any of the others was informed that he was a target or a potential target of any IRS investigation, civil or criminal.[2]

In April, 1978, some four months after they were so questioned, DiBiasi and the four others were officially notified by the IRS that each was a target of a tax investigation. On April 13, 1978, the special agent assigned to the DiVivo investigation telephoned the attorney representing DiBiasi and also one or more of the other four persons. The agent suggested to that attorney that one or more of the latter's clients cooperate with the IRS in the DiVivo investigation. During that conversation the subject of immunity for those clients was discussed. The agent stated that his office within the IRS could not provide immunity to a witness, but that immunity could be secured in an appropriate case. The agent indicated that two of those whose cooperation was sought were resident aliens whose ability to remain in the United States might be adversely affected by a continuing tax investigation. The agent also mentioned that he was aware that DiBiasi had consulted DiVivo's attorney regarding representation of DiBiasi by that attorney. The agent expressed the view that representation by one attorney of both DiVivo and DiBiasi would create a conflict of interest. DiBiasi's attorney formed the impression from that telephone conversation that the IRS was attempting to pressure DiBiasi and the others to cooperate with the IRS in its investigation of DiVivo[3] and that the IRS had possessed information adverse to DiBiasi at the time in 1977 when DiBiasi and the others had been questioned in connection with the DiVivo investigation.

During a second telephone conversation

between DiBiasi's attorney and the agent in charge of the DiVivo investigation, that agent told DiBiasi's attorney that the investigations of DiBiasi and the four others would not be handled by him but instead by other special agents of the IRS, but nevertheless advised DiBiasi's attorney to continue to deal directly with him on the questions of voluntary cooperation and that he would coordinate with the other IRS agents.

On June 13, 1978, at a meeting attended by the agent in charge of the DiVivo investigation, the two agents in charge of the DiBiasi investigation, and the group supervisor of all three agents, DiBiasi's attorney complained about the tax investigations of his clients which he stated had been initiated by the IRS solely to gain cooperation from his clients in the tax investigation of DiVivo. The agents replied that they believed the investigations had been properly initiated and conducted.

On September 8, 1978, the summons in the instant case was issued by the IRS in furtherance of its investigation of DiBiasi. The latter has not opposed Equitable's compliance with the summons. However, DiVivo, exercising his right under 26 U.S.C. §7609(b)(2), instructed Equitable not to comply. Equitable followed that instruction. Thereafter, the IRS initiated this action to compel compliance. DiVivo intervened pursuant to 26 U.S.C. §7609(b)(1) and Federal Civil Rule 24(a). The District Court held an evidentiary hearing in which

it heard direct testimony from the special agent investigation DiBiasi and permitted some cross-examination of that witness. However, the District Court terminated that cross-examination before it was completed, concluding that DiVivo lacked standing to mount his challenge to the IRS summons.[4] Before so doing, Judge Blair expressed doubts as to whether the totality of the evidence proffered by counsel for DiVivo would, in any event, constitute a basis for denying enforcement of the summons.[5]

26 U.S.C. §7609(b)(1) provides that any person named in a summons directed to a "third-party recordkeeper" is entitled to intervene in an action brought to enforce the summons. He therefore had a right to intervene even though the summons is issued in connection with the DiBiasi investigation. DiVivo's right of intervention is, however, procedural , not substantive. "[T]he purpose of this procedure [i.e., the procedure provided by what has since become §7609(b)(1)] is to facilitate the opportunity of the noticee to raise defenses which are already available under the law (either to the noticee or to the third-party witness) [;]*** these provisions are not intended to expand the substantive rights of these parties." S. Rep. No. 938, 94th Cong., 2d Sess. 370-371, reprinted in, and Administrative News 3800; J.R. Rep. 658, 94th Cong. 2d Sess. 309, reprinted in [1976] United States Code Congressional and Administrative News 3205. Thus, §7609(b)(1) does not displace traditional principles of standing and does not permit a litigant to invoke rights belonging to someone else. Accordingly, DiVivo lacks

standing to complain of violations of the Fifth Amendment rights of anyone else resulting from the failure of any IRS agent to warn DiBiasi or anyone else before such person answered questions asked in the course of the DiVivo investigation and in that regard may complain that the District Court should not permit its process to be abused by the issuance of a summons in a bad-faith civil tax investigation of DiBiasi.[6]

The within case was commenced by the United States of America and W. Donald Bell, a special agent of the IRS, by the filing of a petition to enforce the IRS summons issued to Equitable. Therein, petitioners state that "Bell is conducting an investigation of the federal tax liabilities of Angelo DiBiasi for the tax years ending 1974 through 1977 inclusive. Mr. Angelo DiBiasi is part owner of several Italian Delight Restaurants in Baltimore, Maryland."[7] Petitioners also allege: "It was and now is essential to the determination of the tax liabilities of Angelo DiBiasi for the years 1974 through 1977, inclusive,"[8] that the records sought by the summons be produced. Mr. Bell, in an affidavit filed with the petition, states that "in his capacity as a special agent, he is assigned to investigate the tax liabilities of Angelo DiBiasi for the tax years 1974 through 1977, inclusive."[9]

In his response to the petition, DiVivo an intervenor, admits that DiBiasi was "a part owner of several Italian Delight

Restaurants in Baltimore, Marylnad (the metropolitan area, i.e.), but denies the allegations that Special Agent Bell is conducting a proper investigation of Angelo DiBiasi and states that said "alleged investigation has as one of its purposes, if not the primary purpose, to pressure Angelo DiBiasi into cooperating with the Internal Revenue Service in its investigation of Intervenor-Respondent."[10], (Emphasis supplied). Also, in his response, DiVivo takes the following position: "To the extent that the Internal Revenue Service investigation of Angelo DiBiasi, inter alia, has as one of its purposes to pressure him to cooperate in the Government's investigation of Victor DiVivo, said investigation has an improper purpose and/or is being conducted in bad faith."[11] (Emphasis of all but inter alia supplied).

In a memorandum filed December 13, 1978, p. 2.[12] in support of his opposition to the summons, DiVivo reiterates that "one of the purposes of this investigation, if not the primary purpose, is to pressure DiBiasi into cooperating with the Internal Revenue Service in its invesitgation of DiVivo***." (Emphasis supplied).

During the hearing held on December 15, 1978 before Judge Blair, Agent Bell testified that he was "assigned to conduct the invesigation of Angelo DiBiasi*** around March of 1978," that no recommendations had been made by IRS to the Department of Justice for criminal prosecution of

DiBiasi, [13] and that before he had taken steps to have issued the summons in question in this case, he had obtained approval from his "group mananger."[14] On cross-examination, Mr. Bell testified that he had accompanied, as a witness, an agent working on the DiVivo investigation when one or more certain other persons had been questioned.[15]

During the hearing before Judge Blair, counsel for DiVivo stated that "five individuals and business associates of Mr. DiVivo *** are simultaneously under investigation by the Internal Revenue Service including Mr. DiBiasi" and that DiVivo contends that "the investigation of these individuals was begun solely or principally as a subterfuge to get information against Mr. DiVivo,"[16] that the IRS questioned those persons without advising them of their rights and "then subsequently brought the investigation of them, and that "[w]hat we are interested in finding out is why those other individuals are being investigated, and whether the IRS has any good faith purpose to investigate" them.[17] (Emphasis supplied). Earlier during the hearing counsel for DiVivo suggested that perhaps information concerning the identity of persons other than DiVivo and DiBiasi might be given by Bell "in camera." Presumably the in camera technique would have been used to enable the District Court to have learned some details of the reasons of the IRS to investgate DiBiasi and/or others in addition to DiVivo. The Government position, in response, was that "the burden of showing the abuse of the Court's process is on the taxpayer" and that the latter "must make

a substantial preliminary showing before even limited discovery can be ordered."[19] The reference to "discovery" seemingly related to the unrewarded desire of counsel for DiVivo, expressed before the evidentiary hearing commenced, to engage in discovery before the hearing was held.[20]

During the cross-examination before Judge Blair, Bell also testified that one or more other "parties of associate[s] in business with Mr. DiVivo" were under investigation and that their investigations began "sometime in the beginning of 1978."[21] Bell's cross-exmaination was interrupted when Government counsel objected on several occasions to inquiries, which such counsel stated, were related "to the specifics of the investigations" and which he feared might "compromise an ongoing investigation." Judge Blair then asked DiVivo's counsel to state his "theory."[22] In response, after reviewing the historical facts largely set forth supra in this opinion, counsel for DiVivo stated that in the course of questioning, in the presence of their counsel, certain individuals other than DiVivo, an IRS agent had asked questions "that would indicate that the IRS had some information regarding these individuals themselves in the commission of tax crimes by them" and that the "IRS was looking at a pattern of connections, a flow of income, expenses, and so forth between Mr. DiVivo and his individual associates" and that subsequently "the IRS apparently made a determination to investigate these individuals

formally***."[23] (Emphasis supplied). Counsel expressed the conlcusion that the IRS was not involved in a "full-scale investigation" of anyone other than DiVivo and was investigating the others "only insofar as they relate to Mr. DiVivo, and only insofar as they can make a case against Mr. DiVivo***."[24] Judge Blair's comment, after the lenghty presentation of DiVivo's "theory" by the latter's counsel was: "If I ruled without hearing any further evidence, I am going to rule for the Government without any question."[25] However, as indicated supra, in the end, Judge Balir denied the relief soughtby DiVivo because of the lack of standing.

In United States v. Powell, 379 U.S. 48 [14 AFTR 2d 5942] (1964), Mr. Justice Harlan, for six members of the Court, reversed the Third Circuit's refusal to enforce an IRS summons pursuant to 26 U.S.C. §7602 and held (at 51) that in order to obtain judicial enforcement of its orders" (footnote omitted) the IRS "need make no showing of probable cause to suspect fraud unless the taxpayer raises a substantial question that judicial enforcement of the administrative summons would be an abusive use of the court's process ***." Additionally, the Justice wrote (at57-58):

> [The IRS] must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant

> to the purpose, that the information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed***. It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. The burden of showing an abuse of the Court's process is on the taxpayer***. [Footnote omitted].

In Donaldson v. United States, 400 U.S. 517, 536 [27 AFTR 2d 71-482], Mr. Justice Blackmun, for seven members of the Court, concluded:

> We hold that under §7602 an internal revenue summons may be issued in aid of an investigation if it is issued in good faith and prior to a recommendation for criminal prosecution.

Earlier the Justice had commented (at

535):

> This demonstrates that the special agent may well conduct his investigation jointly with an agent from the Audit Division; that their combined efforts are directed to both civil and criminal infractions; and that any decision to recommend prosecution comes only after the investigation is complete or is sufficiently far along to support appropriate conclusions. The fact that a full scale tax fraud investigation is being made does not necessarily mean that prosecution ensues when tax liability becomes apparent.
>
> Congress clearly has authorized the use of the summons in investigating what may prove to be criminal conduct. [Footnote omitted.]

Mr. Justice Blackmun also authored the majority opinion in United States v. LaSalle National Bank, 437 U.S. 298 [42 AFTR 2d 78-5198], 98 S.Ct. 2357, 57 L. Ed. 2d 211 (1978) in which the Supreme Court remanded for further proceedings a case in which the Seventh Circuit had affirmed the District Court's refusal to enforce a §7602 summons. The four dissenters would have reversed and directed the courts below to enforce the summons without any further proceedings. In his opinion, Mr. Justice Blackmun framed the issue as follows (437 U.S. at 307-08):

> The present case requires us to examine the limits of the good-faith use of an Internal Revenue summons issued under §7602. As the preceding disucssion demonstrates, Donaldson does not control the facts now before us. There, the taxpayer has argued that the mere potentiality of criminal prosecution should have precluded enforcement of the summons. 400 U.S. at 532, 27 L.Ed. 2d 580, 91 S.Ct. 534. Here, on the other hand, the District Court found the Special Agent Olivero was investigating Gattuso "solely for the purpose of unearthing evidence of criminal conduct." 76-1 USTC, at 84,073, 37 AFTR 2d, at 76-1240. The question then becomes whether this finding necessarily leads to the conclusion that the summonses were not issued in good-faith pursuit of the congressionally authorized purposes of §7602.

In LaSalle, Mr. Justice Blackmun concluded (at 316-317):

> As in Donaldson, then, where we refused to draw the line between permissible civil and impermissible criminal purposes at the entrance of the special agent into the investigation, 400 U.S., at 536 27 L.Ed. 2d 580, 91 S.Ct. 534, we cannot draw it on the basis of the

agent's personal intent. To do so would unnecessarily frustate the enforcement of the tax laws by restricting the use of the summons according to the motivation of a single agent without regard to the enforcement policy of the Service as an institution. Furthermore, the inquiry into the criminal enforcement objectives of the agent would delay summons enforcement proceedings while parties clash over, and judges grapple with, the thought processes of each investigator.[17] See United States v. Morgan Guaranty Trust Co. [572 F.2d 36[41 AFTR 2d 78-644] (2d Cir. 1978),supra. This obviously is undersirable and unrewarding. As a result, the question whether an investigation has solely criminal purposes must be answered only by an examination of the institutional posture of the IRS. Contrary to the assertion of respondents, this means that those opposing enforcement of a summons do bear the burden to disprove the actual existence of a valid civil tax determination or collection purpose by the Service. After all, the purpose of the good-faith inquiry is to determine whether the agency is honestly pursuing the goals of §7602 by issuing the summons. [Emphasis supplied.]

Without doubt, this burden is a heavy

one. Because criminal and civil fraud liabilities are coterminous, the Service rarely will be found to have acted in bad faith by pursuing the former. On the other hand, we cannot abandon this aspect of the good-faith inquiry altogether.[18] We shall not countenance delay in submitting a recommendation to the Justice Department when there is an institutional commitment to make the referral and the Service merely would like to gather additional evidence for the prosecution. Such a delay would be tantamount to the use of the summons authority after the recommendation and would permit the Government to expand its criminal discovery rights. Similarly, the good-faith standard will not permit the IRS to become an information gathering agency for other departments, including the Department of Justice, regardless of the status of criminal cases.[19]

At oral argument before us, government counsel indicated that the taxpayer's burden to show lack of good faith is so great that a district court need seldom if ever hold an evidentiary hearing before enforcing a §7602 summons. We reject that position, as did the Supreme Court in LaSalle (n.17, n.19), because there are instances in which such a hearing will clearly be required.

Such was the case in United States v.

McCarthy, 514F2d 368 (3rd Cir. 1975) in which defendants stated with sufficient particularity factual support for their allegations that the IRS "had no intention of pursuing any civil remedies" (Id. at 375)[26] and also that the IRS, having made one inspection of the records sought, was harassing the defendants in seeking a second inspection (Id. at 375-76). And see, in a different context, Lord v. Kelly, 223 F. Supp. 684. 689 [13 AFTR 2d 985] (D. Mass. 1963), appeal dismissed on other grounds, 334 F.2d 742 [14 AFTR 2d 5429] (1st Cir. 1964) in which Judge Wyzanski in the District Court wrote (223 F. Supp. at 689-690):

> When a special agent of the Internal Revenue Service tells an accountant who, so far as appears, is quite innocent of wrongdoing, that unless he turns over his client's records and cooperates with the Internal Revenue Services the accountant will be in trouble, the agent is close to extortion.

In United States v. McGuirt, 588 F.2d 419 [42 AFTR 2d 78-6318] (4th Cir. 1978), the District Court, after conducting an evidentiary hearing, refused to enforce a §7602 summons. Reversing, Judge Hall wrote (at 422) that "inconvenience is not harrassment" and did not, in McGuirt, add up to bad faith. In this case, no recommendations have seemingly been made by IRS to the Department of Justice for crim-

inal prosecution of any of the persons under investigation. There are no allegations that the IRS is not interested in the civil aspects of the tax liability of DiBiasi and the four persons questioned with him. There are only allegations of bad faith because of the failure to warn targets or potential targets, and because of the discussion of immunity, all according to DiVivo in violation by the IRS of its own regulations. The failure to warn DiBiasi and the four others hardly in and of itself shows any bad faith. The violation by the IRS of its own regulations, which at trial does not necessarily provide a basis for the application of the exclusionary rule in the absence of a deliberate or prejudicial violation or the denial of a constitutional or statutory right, see United States v. Caceres, 59 L.Ed 2d 733, 744, 745 [43 AFTR 2d 79-872] (1979), is also not proof by itself of bad faith in a tax investigation. As to the immunity discussion, the attorney for DiBiasi, in an affidavit, has stated that during the telephone conversation on April 13, 1978, "the subject of immunity arose."[27] Even assuming that the IRS agent in charge of the DiVivo investigation first raised the subject of immunity and even noting that the IRS Manual instructed agents in terms of "conduct to be avoided" they are to refrain from "statements or questions which may be construed as offers of immunity or attempts to settle civil liabilities in pending criminal cases,"[28] the IRS is expressly provided with authority to allow both criminal and civil immunity

in return for testimony against another. See United States v. Barrett, 505 F.2d 1091, 1101-02 [35 AFTR 2d 75-858] (7th Cir. 1975) in which 18 U.S.C §6002 re criminal immunity and 26 U.S.C. §7122 were discussed. While it is true that in Barrett, the immunity arrangements were made after reference to the Attorney General for prosecution, the parties to the discussions apparently believed that IRS approval was required. In Barrett, Judge Sprecher wrote (at 1102):

> The significance of section 7122 for defendant is that the end the government was seeking to accomplish-Meyers' exemption from civil tax liability-was authorized by law. If the government can excuse criminal or civil liability in settling a criminal case, surely it can use that power of compromise to obtain guilty pleas or to procure testimony in other proceedings. Both are legitimate objectives of plea bargaining.[29]

It is true that in Powell the Supreme Court has stated that "Put[ing] pressure on [a taxpayer] to settle a collateral dispute" (at 58) is an example of bad faith in the use of a §7602 summons. But that was written in the context of a case in which the Court was discussing alleged repetitive inspections by the IRS and does not mean that settlement or compromise or even immunity approaches in and of themselves indicate lack of good faith use of a §7602 summons to aid in civil tax

collection.

Careful examination of the record reveals that if Judge Blair had followed his inclination expressed near the end of the evidentiary hearing he conducted and had held that there were insufficient allegations by DiVivo, to require any further evidentiary inquiry, he would not have been in error. While the District Court's termination herein of the evidentiary hearing may not rest on lack of standing on the part of DiVivo, that termination was fully justified. By the time Judge Blair ended the hearing, he had heard the lengthy proffer from counsel for DiVivo as well as considerable testimony from the special agent in charge of the DiBiasi investigation which disclosed that DiVivo's attack on the good faith of the IRS investigation was without merit.

Powell speaks to the need of a Court "not to permit its process to be abused." United States v. Powell, supra, at 57. Since DiVivo was named in the summons and therefore has standing to intervene in this case, DiVivo may bring the abuse-of-court process contention to the District Court's attention and ask the District Court not to ignore the same, even if the abuse complained of involves no violation of any right of DiVivo. But, even so assuming, DiVivo's allegations, proffers and contentions, if accepted as factually accurate, and giving DiVivo the benefit of all reasonable inferences add up only to the follows: (1) That the IRS was principally and primarily interested in DiVivo and only

secondarily interested in DiBiasi and certain other partners or associates of DiVivo, and (2) that the IRS would not have investigated any of those persons other than DiVivo, if the IRS had not been investigating DiVivo or if one or more of all of those others had cooperated with the IRS against DiVivo. Assuming those facts, such conduct hardly constitutes an abuse of the process of the District Court. There are many criminal cases in which minor defendants are named who would not have been singled out and prosecuted but for the Government's prosecutorial decision to proceed against the major participant or participants. The inclusion of certain minor defendants is often sought by the prosecutor in the hope that one or more of them will enter into agreements to cooperate with the government in return for an undertaking by the government to seek a dismissal or to recommend leniency. Such practices, which have not been deemed inappropriate, see generally Bordenkircher v. Hayes, 434 U.S. 357 (1978), would not seem different than those involved herein. At no time has DiVivo suggested, except once [30] in a single isolated conclusory oral assertion by counsel, that the civil tax investigations of DiBiasi and the others were themselves phony, i.e., that there was no factual basis upon which the IRS could have conducted an investigation to determine whether DiBiasi and the others, as admitted partners and associates of DiVivo, violated any of their respective civil tax duties and that the IRS did not

decide to conduct such investigations. Perhaps, with 20-20 hindsight, the District Court might have required the Government, before terminating the hearing, to file, in camera, an affidavit by Mr. Bell or one or more others, pursuant to Federal Civil Rule 56, giving some details as to the alleged civil tax violations of DiBiasi and the others and the IRS's reasons for investigating those possible violations. But even the use of such summary-type procedures must be carefully tailored to prevent delay of "summons enforcement proceedings while parties clash over, and judges grapple with, the thought processes of each investigator." United States v. Morgan Guaranty Trust Co., quoted by Mr. Justice Blackmun in United States v. LaSalle National Bank, 437 U.S. at 316. In this case the record discloses close cooperation between counsel for DiVivo, on the one hand, and counsel for DiBiasi would know the same and that DiVivo would have presented specifics as to the same in one or more documents pursuant to Federal Civil Rule 56 and/or have informed the District Court of the same during DiVivo's counsel presentation of DiVivo's "theory" of this case. There is thus no need, in this case, to remand for further presentation and consideration of further evidence to an by the District Court in order to afford the opportunity to DiVivo to prove abuse of the process of the District Court by the enforcement of the summons in the civil tax investigation of DiBiasi. DiVivo has had that opportunity and has fallen short of alleging or proffering facts or theory entitling him to any further evidentiary hearing or to any of the relief he seeks.

The judgment below is accordingly affirmed.

WINTER, Circuit Judge, dissenting:

I agree with the majority that DiVivo has standing as an intervenor to raise the question of the good faith of the Internal Revenue Service in issuing the summons for records relating to his business dealings with DiBiasi. I disagree, however, that DiVivo has failed to allege facts sufficient to defeat the enforcement of the summons. Relying on the standards enunciated by the Supreme Court in United States v. Powell, 379 U.S. 48 (1964), I would hold that, when the IRS undertakes investigation of a taxpayer for the primary purpose of pressuring him to give evidence against another taxpayer the investigation is not conducted in good faith and a summons issued in the course of the investigation is therefore not enforceable. In the instant case, DiVivo has alleged that "one of [the] purposes, if not the primary purpose [of the IRS investigation of DiBiasi is] to pressure DiBiasi into cooperating with the Internal Revenue Service in its investigation of [DiVivo]." Moreover, he has proffered evidence which tends to support his allegation. I therefore believe that the district court erred in denying DiVivo the opportunity to prove his allegation. I respectfully dissent.

Powell established that a district court should not enforce a summons issued in the course of an investigation that is not undertaken in good faith. In his opinion for the Court, Justice Harlan stated:

> It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. Such as abuse would take place if the summons had been issued for an improper

> purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. The burden of showing an abuse of the court's process is on the taxpayer . . . .

Id. at 58. Although the claim of harassment advanced by the taxpayer in Powell involved repetitive summonses, the broad scope of the quoted language makes clear that other forms of harassment or bad faith will also render a summons unenforceable. The broad applicability of the Powell standards was reaffirmed in United States v. LaSalle National Bank, 437 U.S. 298 [AFTR 2d 78-5198] (1978). In particular, LaSalle made clear that the Powell standards are independent of, and in addition to, the requirement that a summons must be issued before the IRS has abandoned the pursuit of civil tax determination or collection in favor of criminal prosecution. See id. at 317 n. 19, 318.

DiVivo has alleged that the IRS undertook its investigation of DiBiasi and issued the summons in question for the purpose, if not the primary purpose, of pressuring DiBiasi into cooperating with the investigation of DiVivo by giving evidence against him. If it is proved that the primary purpose of the investigation and the summons was to force DiBiasi's cooperation in the DiVivo investigation, then I think Powell requires that enforcement of the summons be denied. It is difficult to conceive of an example of bad faith that would better qualify as "an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute."

The majority seeks to justify the purpose attributed by DiVivo to the IRS by citing the authority granted to the IRS under IRC §7122(a) to compromise any civil or criminal tax case, prior to referral to the Department of Justice. In United States v. Barrett, 505 F.2d 1091, 1100-03 [35 AFTR 2d 75-858] (7 Cir. 1974), cert. denied, 421 U.S. 964 (1975), §7122(a) was relied upon to permit the grant of civil tax immunity to the accomplice of a bribery defendant, with respect to the income tax owed by the accomplice on bribes which passed through his hands, in exchange for the accomplice's testimony against the defendant. But the power of the IRS to compromise tax cases has no bearing on the question before us. DiVivo does not deny that if the IRS had undertaken an investigation of DiBiasi in good faith for the primary purpose of determining and collecting DiBiasi's tax liability, then the IRS could properly issue summonses pursuant to that investigation and could ultimately compromise DiBiasi's case in exchange for his testimony against DiVivo. Rather, DiVivo alleges that the investigation of DiBiasi was undertaken in bad faith as a pressure tactic to force DiBiasi to cooperate in the investigation of DiVivo. Nothing in §7122(a) or Barrett authorizes the IRS to undertake or pursue an investigation for such a primary purpose.

I fully recognize the difficulty that DiVivo would have in proving his case. Powell places the burden of proving bad faith on the party opposing enforcement, 379 U.S. at 58, and this burden is a heavy one indeed. In order to prevent enforcement of the summons, DiVivo would have to prove that the primary purpose of the investigation of DiBiasi was not to determine and collect his tax liability but rather to pressure him to give evidence against

DiVivo. Although such proof would be quite difficult to establish, DiVivo proffered evidence to the district court, inter alia, that DiBiasi was contacted about cooperating with the DiVivo investigation very soon after receiving notification of his own investigation; that DiBiasi was told to contact the Special Agent in charge of the DiVivo investigation, rather than the agents handling his own investigation; and that the DiBiasi investigation has been characterized by several other unexplained departures from standard IRS procedures. While such evidence may be insufficient to prove the ultimate fact sought to be established, it was sufficient to raise a genuine dispute on the question of good faith of the IRS, and the district court therefore erred in denying DiVivo "the adversary hearing to which [he] is entitled before enforcement [of the summons] is ordered," id.

Although I share the concern expressed by the majority that consideration by district courts of objections charging IRS bad faith may unduly delay the enforcement of IRS summonses, I doubt that such objections will be frequent. The difficulty of proving IRS bad faith, which I discuss above, will be a deterrent to many unfounded objections. Summary procedures, where appropriate, can assist in the expeditious disposition of such objections. See id. at 58 n. 18 (Federal Rules of Civil Procedure govern proceedings to enforce IRS summonses). In any event, both Congress and the Supreme Court have determined that full consideration of objections to the validity of a summons is worth the delay that may result. Congress has provided for a judicial hearing prior to enforcement of a summons and for the right

of a person in DiVivo's position to intervene in such a proceeding. See I.R.C. §§7604(b), 7609(b)(1). And, as the majority notes, the Supreme Court has indicated that occasional delays caused by the consideration of unmeritorious objections to IRS summonses is the necessary price for ensuring that the process of the courts is not abused. See United States v. LaSalle National Bank, 437 U.S. at 316, n. 17; United States v. Powell, 379 U.S. at 58.

I would reverse the judgment of the district court and remand the case for a full hearing on DiVivo's allegations of IRS bad faith.

FOOTNOTES

1. There are two principal investigative divisions within the IRS: The Audit Division and the Criminal Investigation Division. The latter was once known as the Intelligence Division. The Audit Division reviews a taxpayer's returns and recommends adjustments in tax if necessary, and is concerned only with civil adjustments and civil liability. The basic functions of the Criminal Investigation Division are to investigate taxpayers suspected of criminal violations of the tax laws and to recommend prosecution if appropriate. In many instances a Special Agent of the Criminal Investigation Division and a Revenue Agent of the Audit Division work together jointly in an investigation. The Special Agent is usually in charge of any such investigation, with the Revenue Agent assisting in determination of correct tax liability. See Internal Revenue Manual, §9324.

2. The Internal Revenue Manual §9383.1 and 9384.2 and the Special Agents Handbook §243.2 set forth procedures to be followed by Special Agents in conducting themselves during question and answer sessions and advising persons being questioned of their rights.

3. Internal Revenue Manual §9382.2 refers to the use of "alleged improper conduct by special agents as an arm of "defense strategy" and provides that "[i]n order that no situation may arise * * * which may furnish a factual basis for the use of such defense strategy, agents should, inter alia, avoid "(b) statements or questions which may be construed as offers of immunity * * *." See also §9131 of the Internal Revenue Manual.

Special Agents Handbook §242.132 provides, inter alia, "(6) The special agent will not use trickery, misrepresentation or deception in obtaining any evidence or information, nor will he/she use language which might constitute a promise of immunity o[r] settlement of the principal's case, or which might constitute intimidation or threat."

4. Joint Appendix, p. 131.

5. Joint Appendix, pp. 110-13, 125.

6. See the discussion infra at p. 21. In view of the pending investigation of DiVivo, it is not necessary to determine whether and under what conditions DiVivo would possess standing to challenge the abuse of process of this Court in the investigation of DiBiasi, if only the investigation of DiBiasi were ongoing.

7. Petition, Par. IV, Joint Appendix, p. 6.

8. Petition, Par. IX, Joint Appendix, p. 8.

9. Bell Affidavit, Par. 2, Joint Appendix, p. 12.

10. DiVivo Response, par. 4, Joint Appendix, p. 37.

11. DiVivo Response, par. 17, Joint Appendix, p. 39.

12. Joint Appendix, p. 52.

13. Joint Appendix, pp. 94-95.

14. Joint Appendix, p. 97.

15. Joint Appendix, p. 99.

16. It was only at that one moment and in that conclusory language that the record reveals any suggestion by DiVivo that the investigations of persons other than DiVivo were undertaken solely to further the DiVivo investigation.

17. Joint Appendix, pp. 108-109.

18. Joint Appendix, pp. 100 - 111.

19. Joint Appendix, p. 113.

20. Joint Appendix, p. 91.

21. Joint Appendix, p. 116.

22. Joint Appendix, pp. 120-121.

23. Joint Appendix, p. 122. In their principal appellate brief filed in this Court, counsel for DiVivo wrote (at p. 9) with regard to that questioning: "* * * it appears that the Internal Revenue Service may well have had incriminatory information about DiBiasi, et.al at the time of their Q & A's [questions and answers]."

24. Joint Appendix, p. 124.

25. Joint Appendix, p. 125.

26. See also, United States v. Garden State Nat. Bank, 465 F. Supp. 437, 43 A.F. T.R. 2d ¶79-405 (D.N.J. 1979) in which that same question is discussed.

27. Joint Appendix, p. 45.

28. See n. 3, supra.

29. See generally as to plea bargaining, Bordenkircher v. Hayes, 434 U.S. 357 (1978). See also as to the power of the IRS to compromise, United States v. Garden State Nat. Bank, supra at n. 6.

30. See p. 9 and n. 16, supra.